UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT DALL, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	*Civil No. 89-0167 P*
	)	
ROGER COFFIN, et al,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In this action the plaintiffs seek damages pursuant to state tort law and 42 U.S.C. ' ' 1983, 1985(2), 1985(3) and 1986 from the Town of Brunswick, its police chief, Donald Girardin, and five Brunswick policemen[1]. The plaintiffs allege that the defendants engaged in a conspiracy to deprive them of their civil rights under the Fourth and Fourteenth Amendments by use of unreasonable force to arrest them, harassment and malicious prosecution. In addition, the plaintiffs assert the following state law claims: assault, battery, malicious prosecution, negligent infliction of emotional distress, intentional infliction of emotional distress and punitive damages. The defendants have moved for summary judgment on both the state law claims and the civil rights claims.

I. STATE TORT CLAIMS

[1] The policemen named in this action are: Roger Coffin, Donald Goulet, Louis Labbe, James Swint and David Watson.

The defendants contend that summary judgment should be granted on all the state tort claims pursuant to the Maine Tort Claims Act, 14 M.R.S.A. ' ' 8101-8118 (``Act''), because the plaintiffs failed to comply with its notice provision, 14 M.R.S.A. ' 8107. They also assert that, even if the plaintiffs have provided sufficient notice, the Act grants them immunity from the plaintiffs' claims because the actions complained of are within the defendants' discretionary functions. The plaintiffs argue that they complied with the Act's notice provision because they provided notice to the proper town official within the required 180-day period after the accrual of the last cause of action arising out of the events which form the basis of this suit. In addition, they contend that the defendant employees are not immune from the state tort claims because the Act excludes from its broad grant of immunity actions which are intentional and performed in bad faith. *See* 14 M.R.S.A. ' 8111(1)(E).

The Act[2] confers limited immunity in tort actions upon the state, its agencies and political

[2] Provisions of the Act relevant to the immunity issue read as follows:

> **' 8103. Immunity from suit**
>
> **1. Immunity.** Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages. When immunity is removed by this chapter, any claim for damages shall be brought in accordance with the terms of this chapter.
>
> **' 8104-D. Personal liability of employees of a governmental entity**
>
> Except as otherwise expressly provided by section 8111 or by any other law, and notwithstanding the common law, the personal liability of an employee of a governmental entity for negligent acts or omissions within the course and scope of employment shall be subject to a limit of $10,000 for any such claims arising out of a single occurrence and the employee is not liable for any amount in excess of that limit on any such claims.

subdivisions. 14 M.R.S.A. ' ' 8103(1), 8104-D, 8111(1). Where immunity is not so provided the Act ``requires that within 180 days after the accrual of a cause of action against a governmental entity [or its employees] or at a later time (not to exceed two years after such accrual) for good cause shown, a claimant must file a written notice setting forth the particulars of the claim." *Springer v. Seaman*, 658 F. Supp. 1502, 1510 (D. Me) (citing 14 M.R.S.A. ' 8107(1)), *aff'd in part, rev'd in part*, 821 F.2d 871 (1st Cir. 1987). ``Notice of claims against any political subdivision or an employee thereof shall be addressed to and filed with one of the persons upon whom a summons and complaint could be served

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' 8111. Personal immunity for employees; procedure

1. Immunity. Notwithstanding any liability that may have existed at common law, employees of governmental entities shall be absolutely immune from personal civil liability for the following:

. . . .

C. Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid;

D. Performing or failing to perform any prosecutorial function involving civil, criminal or administrative enforcement; or

E. Any intentional act or omission within the course and scope of employment; provided that such immunity shall not exist in any case in which an employee's actions are found to have been in bad faith.

The absolute immunity provided by paragraph C shall be applicable whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question, regardless of whether the exercise of discretion is specifically authorized . . . and shall be available to all governmental employees, including police officers . . ., who are required to exercise judgment or discretion in performing

under the Maine Rules of Civil Procedure, Rule 4, in a civil action against a political subdivision." 14 M.R.S.A. ' 8107(3)(B). Failure to comply with the notice provision means the court lacks jurisdiction and is grounds for dismissal. *Springer*, 658 F. Supp. at 1510-11.

The plaintiffs acknowledge that most of their claims accrued on October 20, 1988 and that they did not file written notice for these claims until June 2 - 9, 1989, outside the mandated 180-day period. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment at 9; Complaint && 12, 16. The plaintiffs argue that they nevertheless complied with the notice provision of the Act because they served the proper parties with notice within the 180-day period after the accrual of the malicious prosecution claim on December 13, 1988, the last cause of action arising from the events upon which they ground their claims. They contend that the 180-day notice period is triggered only after the last cause of action ripens and, in any event, such delay satisfies the good cause requirement of ' 8107. The plaintiffs, however, cite no authority for this proposition.

The Act states that a claimant must file notice ``[w]ithin 180 days after *any* claim or cause of action permitted by this chapter accrues." 14 M.R.S.A. ' 8107(1). The Law Court has observed that ``[t]he general purposes of a notice requirement are to save needless expense and litigation by providing an opportunity for amicable resolution of disputes, and to allow the defendant to fully investigate claims and defenses." *Erickson v. State*, 444 A.2d 345, 349-50 (Me. 1982). Furthermore, the Law Court has repeatedly held that good cause ``pertains only to the *inability* to file the required claim." *Bruno v. City of Lewiston*, No. 5368, slip op. at 3 (Me. Mar. 6, 1990) (emphasis in original). Here it is evident that, with the exception of the malicious prosecution claim, all of the plaintiffs' tort claims accrued on October 20, 1988, and that they did not file notice until June 2-9, 1989, more than

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their official duties.

180 days thereafter. In addition, the plaintiffs have made no showing that they were unable to file the required claim. Therefore, I conclude that there is no genuine issue as to any material fact for trial on the tort claims for which the plaintiff failed to file notice pursuant to the Act. *See* Fed. R. Civ. P. Rule 56(c).

Plaintiff Dall has satisfied the notice provision of the Act respecting his claim of malicious prosecution[3] which is based on the filing of a police report with the Secretary of State on October 21, 1988, the pursuit of and attendance by Officers Swint and Goulet at an administrative hearing before the Secretary of State and the giving of allegedly false testimony thereat. *See* Complaint && 23, 31-32. The defendants argue that they are nevertheless immune from any claim of malicious prosecution by virtue of '' 8104-B and 8111 of the Act. These sections provide that governmental entities and their employees are immune from liability for claims which result from ``[p]erforming or failing to perform any prosecutorial function involving civil, criminal or administrative enforcement." 14 M.R.S.A. '' 8104-B(4), 8111(1)(D). Although the Law Court has not addressed the scope of these sections, it is clear that the Maine Legislature intended to protect governmental entities and their employees from burdensome civil law suits based on unsuccessful civil or criminal prosecutions. In its statement of fact accompanying amendments to the Act the Legislature noted that ' 8104-B ``expressly codifies the common law doctrine of prosecutorial immunity." *See* L.D. 2443, Statement of Fact (113th Legis. 1988). Addressing the immunities contained in ' 8111 the Legislature stated:

[3] To maintain a cause of action for malicious prosecution in Maine the plaintiff must establish that the defendant instituted the proceeding against the plaintiff without probable cause and maliciously. *Nyer v. Carter*, 367 A.2d 1375, 1378-79 (Me. 1977). It is a necessary element of the claim that the proceedings were terminated in the plaintiff's favor. *Nadeau v. State*, 395 A.2d 107, 116 (Me. 1978). Here, the Secretary of State reinstated the plaintiff's driving privileges when he found that the defendants lacked probable cause to stop the plaintiffs for OUI. *See* Exh. 1 to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment.

> [These immunities] are intended to serve important governmental purposes. Government officials are frequently required as part of their jobs to take actions that have serious consequences for the individuals affected. Obvious examples are the actions of law enforcement officers investigating crimes . . . . If these government officials were faced with the constant possibility of personal liability, the inevitable result would be that they would be hesitant to take necessary enforcement action and the public interest would suffer.

Id.

The plaintiffs have not argued for or proposed any construction of these sections which would preclude their application to these defendants. Rather, the defendants' actions appear to be precisely those which the Legislature intended to protect. Therefore, I conclude that the defendants are immune from suit on the claim for malicious prosecution and that there is no genuine issue of material fact for trial on this issue. Accordingly, I recommend that the defendants' motion for summary judgment be granted as to all the state law claims.

II. THE CIVIL RIGHTS CLAIMS

A. Town of Brunswick

The plaintiffs assert that the Town of Brunswick is liable for civil rights violations under ' 1983 and conspiracy to violate their civil rights under ' ' 1983, 1985(2), 1985(3) and 1986. Municipalities are liable under ' 1983 for constitutional violations committed pursuant to a municipal policy or custom. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). Thus, liability can be found ``only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under ' 1983." *City of Canton, Ohio v. Harris*, ___ U.S. ___, 109 S. Ct. 1197, 1203 (1989) (emphasis in original). ``This requires that the

plaintiff[s] demonstrate both the existence of a policy or custom and a causal link between that policy and the constitutional harm." *Santiago v. Fenton*, 891 F.2d 373, 381 (1st Cir. 1989).

The plaintiffs claim that a policy or custom of the Town of Brunswick led to the alleged constitutional deprivations. Specifically, they assert that the Town of Brunswick police ```so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers.'" Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment at 8 (quoting *City of Canton, Ohio*, 109 S. Ct at 1205 n.10). Defendant Town of Brunswick argues that it has no policy or custom of allowing its police officers to violate a citizen's constitutional rights.

Municipal liability for a failure to train is available only when that failure ``evidences a `deliberate indifference' to the rights of its inhabitants . . . . Only where a failure to train reflects a `deliberate' or `conscious' choice by a municipality -- a `policy' as defined by our prior cases -- can a city be liable for such a failure under ' 1983." *City of Canton*, 109 S. Ct. at 1205 (quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985)); *Santiago*, 891 F.2d at 381. The only evidence submitted on the failure to train is defendant Chief of Police Girardin's affidavit outlining the Brunswick Police Department's hiring, training and supervising practices and describing its policy concerning the use of non-deadly force by police officers. Affidavit of Donald Girardin and Exhs. attached thereto.

The plaintiffs have the burden of proving at trial that the Town of Brunswick maintained a policy or custom of allowing its police officers to deprive citizens of their constitutional rights. The showing made by the Town of Brunswick in support of its motion for summary judgment is more than sufficient to shift to the plaintiffs the obligation ``to go beyond the pleadings and by [their] own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)

(quoting Fed. R. Civ. P. 56(e)). This the plaintiffs have not done. Instead they simply rely upon those portions of the defendants' answer to the complaint which admit that at the time of this incident the defendants were acting pursuant to, *inter alia*, customs and usages of the Town. *See* Answer && 5, 21; *see also* Plaintiffs' Statement of Material Facts Which Create Genuine Issues To Be Tried & 15. This admission in no way establishes that a custom or policy of the Town sanctioned directly or indirectly the alleged constitutional deprivations suffered by the plaintiffs. On the contrary the only evidence introduced on this issue fails to reveal the existence of any policy or custom allowing the Brunswick police to use excessive force or otherwise deprive citizens of their constitutional rights. Nor do these documents show that the police so often violated constitutional rights ``that the policymakers of the [Town] can reasonably be said to have been deliberately indifferent to the need" for further training. *City of Canton*, 109 S. Ct. at 1205 (footnote omitted). Therefore, I conclude that the plaintiffs have failed to establish an essential element of their case.

Municipal liability for conspiracy to violate civil rights under '' 1983, 1985 and 1986 requires the same analysis as a claim based on ' 1983. *Owens v. Haas*, 601 F.2d 1242, 1247 (2nd Cir.), *cert. denied*, 444 U.S. 980 (1979); *Hinchy v. City of Chicago*, No. 88-6873 (N.D. Ill. Feb. 2, 1990) (1990 LEXIS Dist. 1253). The plaintiffs must prove that the municipality had a policy or custom which resulted in an agreement to violate the plaintiffs' constitutional rights. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Owens*, 601 F.2d at 1247. Here, the plaintiffs have failed to establish any policy or custom of the Town of Brunswick ``resulting in a conspiracy implicating the [Town] itself." *Owens*, 601 F.2d at 1247.

Accordingly, I recommend that summary judgment be granted as to the Town of Brunswick on all the federal civil rights claims.

B. The Individual Defendants

The plaintiffs allege that the individual defendants deprived them of their Fourth and Fourteenth Amendment rights in violation of 42 U.S.C. ' 1983 (Count I). In addition, they contend that these same defendants engaged in a conspiracy to deprive them of their constitutional rights in violation of 42 U.S.C. ' ' 1985(2), 1985(3) and 1986 (Counts V & VI). The defendants argue that they are protected by qualified immunity for discretionary acts performed within the scope of their employment and that there is no evidence that they engaged in a conspiracy against the plaintiffs.

1. Qualified Immunity

The Supreme Court has held that ``government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This ``objective reasonableness" test is designed to ``avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* In a subsequent case the Supreme Court explained that:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell* [*v. Forsyth*, 472 U.S. 511,] 535, n.12; but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987). Pursuant to *Anderson*, the court must engage in a two-step analysis:

> We first examine the law, to determine whether the right allegedly violated was ``clearly established"; if so, the defendant should reasonably have known of the right. Second, we examine the

> defendant's conduct, to establish whether objectively it was reasonable for him to believe that his actions did not violate a ``clearly established" right.

Rodriguez v. Comas, 888 F.2d 899, 901 (1st Cir. 1989).

The plaintiffs have a clearly established Fourth Amendment right to be free from the use of unreasonable force by law enforcement officials during seizure and arrest.[4] *Graham v. Connor*, ___ U.S. ___, 109 S. Ct. 1865, 1871 (1989); *Fernandez v. Leonard*, 784 F.2d 1209, 1217 (1st Cir. 1986); *Vitalone v. Curran*, 665 F. Supp. 964, 974 (D. Me. 1987).[5] Thus, the individual defendants are entitled to summary judgment on the ground of qualified immunity only if in the second step of the analysis they can show that, ``in light of the facts known to the officers at the time of their actions and the

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[4] Plaintiff Dall has also claimed that the defendants' malicious prosecution deprived him of civil rights under ' 1983. *See* Complaint & 23. The Court of Appeals for the First Circuit has twice declined to determine whether the tort of malicious prosecution states such a claim. *See Santiago*, 891 F.2d at 388. It has stated, however, that:

> In any event, [the defendants] would be entitled to qualified immunity on this ' 1983 claim. Because the law was by no means clear . . . that malicious prosecution alone formed the basis for a claim of violation of plaintiff[s'] civil rights, there was no clearly established constitutional counterpart to an action for malicious prosecution.

Id. Given the continued uncertainty in this circuit as to whether the tort of malicious prosecution does state a claim for denial of civil rights under ' 1983, I conclude that, to the extent the plaintiff Dall is claiming the alleged malicious prosecution violated his constitutional rights, the defendants' motion for summary judgment should be granted on qualified immunity grounds.

[5] The Supreme Court recently held that ``*all* claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other `seizure' of a free citizen should be analyzed under the Fourth Amendment and its `reasonableness' standard, rather than under a `substantive due process' approach." *Graham v. Connor*, 109 S. Ct. at 1871 (emphasis in original). Consequently, I will treat the plaintiffs claims as raising only a Fourth Amendment claim even though they assert violations of their rights under the due process clause as well as the Fourth Amendment.

clearly established law governing those actions, a `reasonable' [law enforcement official] could have believed the actions lawful." *Vitalone*, 665 F. Supp. at 974.

The Fourth Amendment permits law enforcement officials to use ``some degree of physical coercion or threat thereof to effect" an arrest. *Graham*, 109 S. Ct. at 1871. To determine the reasonableness of the force used during a particular seizure, courts must balance the individual's Fourth Amendment interests against countervailing governmental interests. *Id.* This reasonableness test ``requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 1871-72. ``The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Id.* at 1872. Nevertheless, the test is one of objective reasonableness; an officer's underlying intent or motivation is irrelevant. *Id.*

The court shall grant summary judgment if there remains ``no genuine issue as to any material fact" and if ``the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The undisputed[6] material facts relevant to the question of qualified immunity may be summarized as follows: In the early evening of October 19, 1988 plaintiffs Dall and Owen travelled from Dall's residence on Maquoit Road in Brunswick to the Drift Inn II bar in Brunswick. Dall drove to the bar in his 1988 GMC pickup truck, with Owen riding as his passenger. Dall parked the truck behind the Drift Inn II and the plaintiffs entered the bar where they stayed for a period of four or five hours drinking and socializing. Defendant Goulet saw the plaintiffs at the Drift Inn II early that evening. At

approximately 9:00 that evening Dall and Owen left the Drift Inn II and walked over to the Thirsty Dolphin where they remained until approximately midnight when they left and walked back to the truck. Throughout the course of the evening the plaintiffs drank approximately 10-12 beers apiece as well as at least two mixed drinks.

The events which followed the plaintiffs' departure from the Thirsty Dolphin make up the core of this action and are bitterly disputed. The defendants' version of the facts are that defendants Goulet and Swint were on patrol in a marked police cruiser traveling south on Union Street at approximately midnight. Transcript, Hearing In Re: Robert Dall at 7, 53. They observed Dall's truck ahead of them driving south on Union Street and clocked the truck on their radar traveling 30 mph in a 25 mph zone. *Id.* In addition, they noted that the left brake light was not operating, the rear licence plate light was not operating and the truck was traveling down the middle of a two-way road which had no lane markings painted on it. *Id.* At one point they observed that the truck was three-quarters of the way over in the oncoming lane. *Id.* The truck suddenly made an unsignaled right-hand turn into a driveway after the intersection of Union and Weymouth Streets. *Id* at 7-8. As Officers Goulet and Swint initially drove past the parked truck and trained a light on it they were able to see the outline of two people sitting in the truck, including the face of the person sitting in the driver's seat whom Goulet recognized as Dall. *Id.* at 8. Officer Swint resided in the general area and knew that Dall and Owen did not live at that address. *Id* at 8-9. Officer Goulet then turned the cruiser around and pulled in the same driveway behind the truck. *Id.* at 8.

As the officers exited the cruiser it appeared that there was no one in the truck. *Id* at 9. Officer Swint then left the cruiser and ran past the truck to look in some bushes to see if anyone had

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[6] *See* Plaintiffs' Statement of Material Facts Which Create Genuine Issues To Be Tried & 1.

left the truck and was hiding. *Id.* at 53. Goulet immediately approached the truck and saw Dall and Owen crouched down on the seat; he opened the driver's side door and asked Dall for his license and registration. *Id.* at 9, 53. Goulet noted a strong odor of intoxicants emanating from inside the truck and that it grew stronger when Dall spoke. *Id.* at 9. Goulet then requested Dall to get out of the truck and perform a field sobriety test. *Id.* Dall refused to leave the truck. *Id.* at 9-10. Goulet observed Dall reaching toward the floor on the driver's side for a small wooden bat in a threatening manner. *Id.* at 10. At this point he advised Dall that he was under arrest for operating under the influence and went into the truck in order to keep him from retrieving the bat. *Id.* Dall continued to resist and attempted to strike Goulet with his fists. *Id.* He also began screaming that he was going to kill Goulet. *Id.* Goulet grabbed Dall by the scalp, a struggle ensued and Swint returned to the truck to assist Goulet in arresting Dall. *Id.* at 10-11. During that struggle Dall was maced in an attempt to subdue him. *Id.* at 11. At some time during the arrest Officers Labbe, Coffin and Caron arrived in response to a back up call from Goulet and Swint. Affidavit of Sgt. Roger Coffin; Affidavit of Louis Labbe. Also during the arrest Owen left the cab of the truck but was told by other officers to ``back off." Affidavit of Sgt. Roger Coffin; Deposition of Rodney R. Owen at 58. Owen was not arrested and was allowed to go. Deposition of Rodney R. Owen at 58-59. Dall was then transported to the Brunswick police station where he was read an implied consent form for a blood alcohol test. Transcript, Hearing In Re: Robert Dall at 13. He was later taken to Parkview Hospital after complaining about back pain and difficulty breathing. *Id.* At the hospital it was requested that he take a blood alcohol test, which he refused. *Id.* at 14.

The plaintiffs' version of these events is markedly different. They claim that upon leaving the Thirsty Dolphin Dall and Owen both felt too drunk to drive and called Dall's wife for a ride home. Deposition of Rodney R. Owen at 36-37; Deposition of Robert Dall at 92. Dall and Owen met Dall's

neighbor, Thomas Fraser, at the truck. Deposition of Rodney R. Owen at 37; Deposition of Robert Dall at 92-93. He had been dropped off by Brenda Dall so he could drive the truck and the plaintiffs home. Deposition of Rodney R. Owen at 37; Deposition of Robert Dall at 92. Fraser, Dall and Owen climbed into the truck, and Fraser drove with Dall in the middle and Owen on the far right. Deposition of Rodney R. Owen at 37-38; Deposition of Thomas E. Fraser at 19-22. Fraser proceeded south on Union Street within the posted speed limit and in the proper lane. Deposition of Thomas E. Fraser at 22-23. He observed in his rear view mirror a car coming toward them at high speed. *Id.* at 24. Suspecting it was a police officer, he turned the truck into the driveway. *Id.* When the cruiser passed them all three men were sitting in the truck. Deposition of Rodney R. Owen at 42-43. After the cruiser passed the truck Fraser jumped out and left the scene. Deposition of Thomas E. Fraser at 28-31. When the officers pulled in behind the truck Dall and Owen were sitting in the front seat, upright and facing forward. Deposition of Rodney R. Owen at 46-47. Goulet and Swint went to the driver's side door and Goulet ordered Dall out of the truck. *Id.* at 47. Neither Goulet nor Swint asked Dall for his license and registration or to perform a field sobriety test. *Id.* at 50-51; Deposition of Robert Dall at 94. During this time other police officers arrived. Deposition of Rodney R. Owen at 49-50, 77.

Before Dall could climb over the gear shift to exit the truck, Goulet grabbed him by the hair and pulled him from the truck. *Id.* at 51. Once out of the truck he was maced and beaten by three officers. *Id.* at 51-54; Deposition of Robert Dall at 94. At no time did he resist arrest or ever reach for a small wooden bat. Deposition of Rodney R. Owen at 51-53; Deposition of Robert Dall at 100. Owen exited the truck while Dall was being assaulted whereupon Swint approached him from behind and poked him with a night stick. Deposition of Rodney R. Owen at 57-58. Owen never attempted to obstruct the officers or interfere with their actions. *Id.* Dall was transported to the Brunswick police

station but was never read the blood alcohol implied consent statement. Transcript, Hearing In Re: Robert Dall at 82-83. He was later taken to Parkview Hospital and was treated, but refused to allow a blood alcohol test. *Id.*

If the defendants' version of the disputed facts is accepted the officers could have reasonably believed that the force used was lawful because such force was necessary to protect themselves from the potential force of the plaintiffs. If, however, the plaintiffs' version of the facts is correct the defendants could not have reasonably believed that such force was necessary, and thus the defendants would not be entitled to qualified immunity. I conclude that there are genuine issues of material fact regarding the question of qualified immunity as to the individual defendants who were present at Dall's arrest.

However, I find as to defendant Watson that there is no genuine issue as to any material facts. Defendant Watson has submitted an affidavit stating that he was not on duty the night of October 19, 1988, was not present at the scene of the arrest and was in no way involved in the arrest or detention of either plaintiff. Affidavit of William D. Watson & 3. The plaintiffs have failed to submit any evidence in support of their contention that defendant Watson took part in the arrest. *See Celotex Corp. v. Catrett*, 477 U.S. at 324.

In addition, I also conclude that the plaintiffs have failed to support their contention that defendant Girardin's supervision of the other defendants violated the plaintiffs' constitutional rights. Defendant Girardin's affidavit clearly establishes that ``it was reasonable for him to believe that his actions did not violate a `clearly established' right." *Rodriguez*, 888 F.2d at 901; *see* Affidavit of Chief Donald Girardin. The depositions and affidavits submitted by the plaintiffs never address this point. *Celotex*, 477 U.S. at 324. Furthermore, the plaintiffs have alleged that defendant Girardin's negligence caused the constitutional violations. Negligent conduct alone, however, is not actionable under ' 1983.

Daniels v. Williams, 474 U.S. 327, 328 (1986); *Ramirez v. Garcia*, No. 89-1103, slip op. at 5 (1st Cir. Mar. 13, 1990) (1990 LEXIS App. 3702). Accordingly, I conclude that the motion for summary judgment should be granted in favor of defendants Girardin and Watson on the ' 1983 claim.

2. Conspiracy

The plaintiffs claim that the individual defendants conspired to deprive them of their constitutional rights in violation of 42 U.S.C. ' ' 1983, 1985(2), 1985(3) and 1986. The defendants argue that there is no evidence of a conspiracy to violate the plaintiffs' rights under ' 1983 and that the plaintiffs have failed to allege any class bias or discrimination necessary to make out a claim under ' 1985.

To prove a conspiracy under ' 1983 the plaintiffs must establish that the defendants reached an understanding to violate the plaintiffs' constitutional rights. *Adickes v. S.H. Kress & Co.*, 398 U.S. at 152; *Santiago v. Fenton*, 891 F.2d at 389. Circumstantial evidence is sufficient to prove a conspiracy. *Santiago*, 891 F.2d at 389. As discussed above, there are genuine issues of material fact in dispute as to the reasonableness of the actions of the officers present at the scene of the arrest. Those same facts are relevant to the plaintiffs' claim of conspiracy to violate ' 1983. There are genuine issues of fact in dispute as to whether the arresting officers reached an understanding to violate the plaintiffs' civil rights. Therefore, I recommend that the defendants' motion for summary judgment be denied on the ' 1983 conspiracy claims as to those defendants present at the scene of the arrest. However, as to defendants Girardin and Watson the plaintiff has failed to make any showing that these two defendants were parties to an agreement to deprive the plaintiffs of their civil rights. Accordingly, I recommend that the motion for summary judgment be granted in favor of defendants Girardin and Watson on the conspiracy claim.

So far as the '' 1985(2), 1985(3) and 1986 conspiracy claims are concerned, the latter part of 42 U.S.C. ' 1985(2), *see Hahn v. Sargent*, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976), and all of ' 1985(3) ``provide[] an action for any person or class of persons injured by a conspiracy organized `for the purpose of depriving, either directly or indirectly, [such persons] of the equal protection of the laws.'" *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 834 n.13 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982). The first part of ' 1985(2) ``is addressed to conspiracies to interfere with parties, jurors or witnesses in proceedings in federal courts." *Hahn*, 523 F.2d at 469. In addition, the First Circuit has stated that the latter part of ' 1985(2) and all of ' 1985(3) require `class-based, invidiously discriminatory animus." *Hahn*, 523 F.2d at 469; see *also Creative Environments*, 680 F.2d at 834. Section 1986 ``provides that anyone who knows of a conspiracy which would violate section 1985, has the power to prevent it, and fails to do so, is as liable as a conspirator." *Creative Environments*, 680 F.2d at 834 n.14. Here the plaintiffs have alleged neither class-based discriminatory animus nor a conspiracy to interfere with proceedings in federal courts. Accordingly, I recommend that the individual defendants' motion for summary judgment be granted on the conspiracy claims.

III. CONCLUSION

For the foregoing reasons I recommend that the defendants' motion for summary judgment be:

1. ***GRANTED*** as to all defendants on all the state law claims;

2. ***GRANTED*** as to the Town of Brunswick and individual defendants Watson and Girardin on all the federal claims;

3. ***GRANTED*** as to the individual defendants Coffin, Goulet, Labbe and Swint on all the federal claims which are based on ' 1985, ' 1986 and that portion of ' 1983 grounded on malicious prosecution; and

4. ***DENIED*** as to the individual defendants Coffin, Goulet, Labbe and Swint on the remaining federal claims.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 23rd day of March, 1990.

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David M. Cohen
United States Magistrate